Calendar No. 1065

99TH CONGRESS
2d Session

SENATE

REPORT
99-519

THE INTER-AMERICAN CONVENTION ON INTERNATIONAL COMMERCIAL ARBITRATION IMPLEMENTATION ACT

OCTOBER 2 (legislative day, SEPTEMBER 24), 1986.—Ordered to be printed

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Mr. LUGAR, from the Committee on Foreign Relations, submitted the following

REPORT

[To accompany S. 1828]

The Committee on Foreign Relations to which was referred the bill (S. 1828) to implement the Inter-American Convention on International Commercial Arbitration, having considered the same, reports favorably thereon with an amendment and recommends that the bill as amended do pass.

I. PURPOSE

The purpose of S. 1828 is to implement the Inter-American Convention on International Commercial Arbitration.

II. BACKGROUND

The Inter-American Convention on International Commercial Arbitration was transmitted to the Senate for its advice and consent to ratification on June 15, 1981; the instrument of ratification will be deposited with the General Secretariat of the Organization of American States once appropriate implementing legislation has been enacted. The Convention would enter into force for the United States on the thirtieth day after deposit of the instrument of ratification.

The Inter-American Convention on International Commercial Arbitration entered into force on June 16, 1976. At present, Chile, Costa Rica, El Salvador, Honduras, Mexico, Panama, Paraguay, Uruguay and Venezuela are parties. Consistent with the longstanding U.S. policy to facilitate the use of arbitration as a means of resolving international commercial disputes, this Convention will

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provide an opportunity to secure wider benefits of recognition and enforcement of international commercial arbitration agreements and awards among a greater number of countries in this hemisphere.

The Inter-American Convention on International Commercial Arbitration is modeled after the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, to which the United States became a party in 1970. The Convention is currently pending on the Executive Calendar (Treaty Doc. 97-12) awaiting the advice and consent of the Senate in order that the United States may become a party. This bill incorporates, in large part, the legislation which implements the New York Convention, 9 U.S.C. 201-208. Several new provisions are incorporated in the bill, however, in order to clarify the sphere of application of the Inter-American Convention and to safeguard its provisions respecting arbitral procedures: these are described more fully in the section-by-section analysis.

The Inter-American Convention on International Commercial Arbitration has received the support of a large number of interested and representative organizations, including the American Bar Association, the American Arbitration Association, the U.S. Chamber of Commerce, the Association of American Chambers of Commerce in Latin America, the American Foreign Law Association, and a number of State and local bar associations. Experts from the American Arbitration Association and American Bar Association have reviewed the proposed legislation and have advised that they consider it satisfactory.

Approval of this implementing legislation will permit U.S. citizens and concerns seeking enforcement of commercial arbitration agreements and awards to enjoy the benefit of this Convention among the countries which are parties, and may encourage more rapid and widespread ratification by other countries as well.

III. Major Provisions

The bill adds a new chapter to title 9, the arbitration title of the United States Code. The new chapter gives U.S. courts the power to compel arbitration when the parties have included an arbitration clause in their contract. It also requires U.S. courts to recognize arbitration awards granted pursuant to the Convention subject to the exceptions in article 5.

In addition, an amendment by Senator Mathias which was adopted by the committee adds a provision to S. 1828 to promote arbitration as a viable alternative to court action when attempting to solve international commercial disputes. This amendment amends section 207 of title 9 of the United States Code by adding a provision at the end of that section which explicitly stipulates that U.S. courts cannot recognize the Act of State doctrine or the Foreign Sovereign Immunity defense as a cause for refusal to enforce an otherwise valid arbitral award.

Currently arbitration agreements and awards are enforced under the provisions of the Foreign Sovereign Immunities Act that concern explicit or implied waivers of immunity. Although courts are finding that arbitration agreement constitute waivers in the appro-

priate cases, the amendment would give more explicit guidance to judges in dealing with these issues. The amendment would also remove any doubt about the inapplicability of the Act of State doctrine to cases involving the enforcement of arbitration agreements or awards.

IV. Committee Action

S. 1828 was introduced by Senator Lugar (by request) on November 5, 1985. Senator Mathias held a hearing on S. 1828 and the Inter-American Convention on Commercial Arbitration on June 11th, receiving testimony from Deputy Legal Advisor of the State Department Mary V. Mochary and Arthur W. Rovine, Chairman, Section of International Law and Practice, American Bar Association. The committee considered S. 1828 on September 9 and reported it favorably with an amendment by a vote of 15–0. Senators voting on the affirmative were Senators Lugar, Helms, Mathias, Boschwitz, Pressler, Murkowski, Trible, Evans, Pell, Biden, Sarbanes, Zorinsky, Dodd, Eagleton, and Kerry.

V. Section-by-Section Analysis

Section 1. Section 1 of the bill amends Title 9 of the United States Code by addition of a new Chapter 3, consisting of sections 301 through 307. As amended, Title 9 would thus contain three chapters: Chapter 1 (sections 1–14), the original Federal Arbitration Act; Chapter 2 (sections 201–208), the implementing legislation for the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958 ("New York Convention"); and Chapter 3 (sections 301–307), implementing legislation for the Inter-American Convention on International Commercial Arbitration of January 30, 1975 ("Inter-American Convention").

Section 301. Section 301 of Title 9 parallels section 201 of the implementing legislation for the New York Convention.

Section 302. Section 302 incorporates sections 202, 203, 204, 205, and 207 of the implementing legislation for the New York Convention: the two Conventions do not differ so as to call for different measures of implementation in these respects.

The incorporation of section 202, which provides that an arbitration agreement or arbitral award arising out of a legal relationship "which is considered as commercial" falls under the Convention (as incorporated, the reference is to the Inter-American Convention), provides the basis for a broad definition of the term "commercial" for purposes of the Convention. The Convention itself provides no definition of the term, but it is the understanding of the United States that trade, investment, and other business and financial activities which bear on "foreign commerce" are considered "commercial" and are thus within the purview of the Convention.

The incorporation of section 202 also clarifies that the Inter-American Convention, like the New York Convention, shall be deemed not to apply to an arbitral agreement or award arising out of a legal relationship which is entirely between citizens of the United States, unless there is a reasonable foreign element in the relationship as defined in section 202.

The incorporation of sections 203 and 204 extends the same provisions concerning jurisdiction of the U.S. district courts and venue to actions or proceedings falling under the Inter-American Convention as apply to those falling under the New York Convention. Similarly, the incorporation of section 205 gives defendants the right to remove actions or proceedings relating to arbitration agreement or awards falling under the Inter-American Convention from State courts to U.S. district courts, as is now the case for those falling under the New York Convention.

With the incorporation of section 207, the 3-year limitation period for application to a court for an order confirming an arbitral award that applies to awards falling under the New York Convention will also apply to awards falling under the Inter-American Convention. Section 207 also requires the court to confirm the award "unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention." Those grounds are specified in Article 5 of the Inter-American Convention, which was taken almost verbatim from Article V of the New York Convention in order to assure that the sole grounds for refusal of the recognition and enforcement of an award would be the same under both Conventions.

Section 303. The first paragraph of this section repeats 9 U.S.C. section 206, providing that a court may direct that arbitration be held in accordance with the agreement at any place therein provided for, whether that place is within or without the United States, and that the court may also appoint arbitrators in accordance with the provisions of the agreement. Neither the Convention nor section 303 attempts to resolve other issues which the court may be asked to address in connection with a matter which is to be submitted to arbitration.

The second paragraph of section 303 is new, reflecting Article 3 of the Inter-American Convention. Article 3 provides that when or to the extent that the parties fail to agree upon other applicable rules of procedure, the arbitration shall be governed by the rules of procedure of the Inter-American Commercial Arbitration Commission, a private organization originally established in 1934 at the recommendation of the predecessor of the Organization of American States (OAS).

Neither the Federal Arbitration Act nor the New York Convention contains a comparable provision, but rather leaves the choice of rules of procedure to the court in the absence of agreement by the parties. The specification of "back-up" rules provides a desirable certainty and uniformity in the application of the Inter-American Convention.

Section 304. Section 304 provides a rule of reciprocity analogous to that applicable to the New York Convention. The latter permits a reservation, which the United States has made, that a State may on the basis of reciprocity apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State (Article I, paragraph 3). The United States will make a comparable reservation to the Inter-American Convention, and section 304 has been drafted to make that reservation readily available for the reference of courts and practitioners. Also, the section has been worded in such a way as to make clear that it is

intended only to be a rule of reciprocity and not a determination that arbitral decisions and awards made in the United States are excluded from the applicability of the Inter-American Convention if they otherwise fall under the Convention and the provisions of chapter 3, including in particular section 202 as incorporated in chapter 3. Litigation has been required to resolve that issue, insofar as the applicability of the New York Convention is concerned, given the less than precise wording of the two sentences of paragraph 1 and the first sentence of paragraph 3 of Article I of the New York Convention. The Inter-American Convention contains no comparable provisions; while it deals only with "international commercial arbitration," there is nothing in the language of the Convention or in the negotiating history to indicate an intent to limit the applicability of its recognition and enforcement provisions to awards made in countries other than those where recognition and enforcement are sought.

Section 305. The Inter-American Convention does not contain an express provision concerning its applicability when there is another convention on recognition and enforcement of arbitral agreements and awards which might also apply to a specific case. In particular, the United States and at least some other countries will be a party to both the Inter-American and the New York Conventions. Given the substantial identity of the two conventions, this issue is not expected to be of great consequence. However, it is nonetheless useful to resolve it explicitly in order to remove a potential ground for controversy.

The New York Convention is better established in law and in practice than the Inter-American Convention and has greater worldwide participation. The United States will therefore enter a reservation in ratifying the Inter-American Convention, to establish clearly the applicability of the New York Convention in appropriate cases.

Section 305 reflects this reservation, providing that, where both Conventions are applicable to a particular case, the United States would be bound and apply the provisions for the Inter-American Convention only if a majority of the parties to the arbitration agreement are citizens of a State or States that have ratified or acceded to this Convention and are citizens of OAS Member States. In other cases, the United States will be bound by and apply the provisions of the New York Convention. Section 305 makes clear that, where both Conventions are potentially applicable, both parties must be citizens of OAS Members States before the Inter-American Convention would supersede the New York Convention.

Section 306. Section 306, like section 303, is necessary in order to implement the Article 3 provision of the Inter-American Convention which specifies applicable rules of procedure for cases in which the parties fail to agree on such rules. While the rules of procedure of the Inter-American Commercial Arbitration Commission are deemed useful and acceptable, the Commission is a private nongovernmental body. It is therefore desirable that there be official review and approval of any amendments to the rules before they are made applicable to parties by law.

The United States will enter a reservation regarding article 3 that the United States will apply the rules of procedure of the

Inter-American Commercial Arbitration Commission which are in effect as of ratification, unless a later official determination is made to adopt and apply any amendments to the rules which the Inter-American Commercial Arbitration Commission may make subsequently. Section 306 provides a rulemaking procedure for making such an official determination; this procedure provides a simple and efficient mechanism for soliciting the comments of interested and expert groups and individuals in order to provide an informed basis for official judgment and determination.

Section 307. Section 307 incorporates a provision parallel to 9 U.S.C. section 208.

Section 2. Section 2 of the bill adds a new subheading to the table of chapters at the beginning of Title 9 to correspond to the new Chapter 3.

Section 3. Section 3 of the bill establishes the effective date.

Section 4. Section 4 of the bill adds new language to section 207 of title 9 which explicitly stipulates that U.S. courts cannot recognize the Act of State doctrine or the Foreign Sovereign Immunity defense as a cause for refusal to enforce an otherwise valid arbitral award.

COST ESTIMATE

In accordance with Rule XXVI, paragraph 11(a) of the Standing Rules of the Senate, the Committee provided the following estimate of the cost of S. 1828, prepared by the Congressional Budget Office:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, September 26, 1986.

Hon. RICHARD LUGAR,
Chairman, Committee on Foreign Relations, U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: Pursuant to Section 403 of the Congressional Budget Act of 1974, the Congressional Budget Office has received S. 1828, to implement the Inter-American Convention on International Commercial Arbitration, as ordered reported by the Senate Committee on Foreign Relations on September 9, 1986.

The Inter-American Convention on International Commercial Arbitration is patterned after the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards, which was ratified by the United States in 1970. Both are designed to facilitate the settlement of international commercial disputes through the use of arbitration. Supporters of the Inter-American Convention are hopeful that its adoption by the United States and other member states of the Organization of American States will increase the use of arbitration in international commercial disputes in this hemisphere.

Implementation of the Inter-American Convention will not result in the creation of any new organizations or commissions. No authorizations of appropriations are included in this bill, and thus it is expected that no additional cost to the federal, state, or local governments will be incurred as a result of enactment of this legislation.

With best wishes,
Sincerely,

ROSEMARY MARCUSS
(For Rudolph G. Penner, *Director).*

EVALUATION OF REGULATORY IMPACT

In accordance with Rule XXVI, paragraph 11(b) of the Standing Rules of the Senate, the Committee has concluded that there is no regulatory impact from S. 1828.

CHANGES IN EXISTING LAW

In compliance with paragraph 12 of Rule XXVI of the Standing Rules of the Senate, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

TITLE 9—ARBITRATION

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TABLE OF TITLES AND CHAPTERS

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TITLE 9—ARBITRATION

1. General Provisions.
2. Convention on the Recognition and Enforcement of Foreign Arbitral Awards.
3. Inter-American Convention on International Commercial Arbitration

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CHAPTER 1—GENERAL PROVISIONS

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CHAPTER 2—CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

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§ 207. Award of arbitrators; confirmantion; jurisdiction; proceeding

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An agreement to arbitrate shall be deemed to constitute consent to proceedings to recognize, confirm, or enforce by levy, attachment, or otherwise any arbitral award made pursuant to such agreement and referred to in this section, and neither the Federal act of State doctrine nor the doctrine of sovereign immunity shall constitute grounds or be the basis for refusal or deferral of recognition, confirmation, or enforcement of any such arbitral award against a foreign state or an agency or an instrumentality of a foreign state.

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CHAPTER 3. INTER-AMERICAN CONVENTION ON INTERNATIONAL COMMERCIAL ARBITRATION

Sec.

301. Enforcement of Convention.
302. Incorporation by reference.
303. Order to compel arbitration; appointments of arbitrators; local.
304. Recognition and enforcement of foreign arbitral decisions and awards; reciprocity.
305. Relationship between the Inter-American Convention and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958.
306. Applicable rules of Inter-American Commercial Arbitration Commission.
307. Chapter 1; residual application.

§ 301. Enforcement of Convention

The Inter-American Convention on International Commercial Arbitration of January 30, 1975, shall be enforced in United States courts in accordance with this chapter.

§ 302. Incorporation by reference

The provisions of chapter 2, sections 202, 203, 204, 205, and 207 shall apply to this chapter as if specifically set forth herein, except that for the purpose of this chapter "the Convention" shall mean the Inter-American Convention.

§ 303. Order to compel arbitration; appointment of arbitrators; locale

A court having jurisdiction under this chapter may direct that arbitration be held in accordance with the agreement at any place therein provided for, whether that place is within or without the United States. The court may also appoint arbitrators in accordance with the provisions of the agreement.

In the event the agreement does not make provision for the place of arbitration or the appointment of arbitrators, the court shall direct that the arbitration shall be held and the arbitrators be appointed in accordance with article 3 of the Inter-American Convention.

§ 304. Recognition and enforcement of foreign arbitral decisions and awards; reciprocity

Arbitral decisions or awards made in the territory of a foreign State shall, on the basis of reciprocity, be recognized and enforced under this chapter only if that State has ratified or acceded to the Inter-American Convention.

§ 305. Relationship between the Inter-American Convention and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1985

When the requirements for application of both the Inter-American Convention and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, are met, determination as to which Convention applies shall, unless otherwise expressly agreed, be made as follows:

(1) If a majority of the parties to the arbitration agreement are citizens of a State or States that have ratified or acceded to the Inter-American Convention and are member States of the

Organization of American States, the Inter-American Convention shall apply.

(2) In all other cases the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, shall apply.

§ 306. Applicable rules of Inter-American Commercial Arbitration Commission

(a) For the purposes of this chapter the rules of procedure of the Inter-American Commercial Arbitration Commission referred to in article 3 of the Inter-American Convention shall, subject to subsection (b) of this section, be those rules as promulgated by the Commission on January 1, 1978.

(b) In the event the rules of procedure of the Inter-American Commercial Arbitration Commission are modified or amended in accordance with the procedures for amendment of the rules of the said Commission, the Secretary of State, by regulation in accordance with section 553 of title 5, United States Code, consistent with the aims and purposes of this Convention, may prescribe that such modifications or amendments shall be effective for purposes of this chapter.

§ 307. Chapter 1; residual application

Chapter 1 applies to action and proceedings brought under this chapter to the extent chapter 1 is not in conflict with this chapter or the Inter-American Convention as ratified by the United States.

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